

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>CENTURY 2000 PETROLEUM, INC.</b>	:	DETERMINATION
	:	DTA NO. 817774
for Review of a Denial, Suspension, Cancellation or	:	
Revocation of a License, Permit or Registration under	:	
Articles 12-A and 13-A of the Tax Law.	:	

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Petitioner, Century 2000 Petroleum, Inc., P.O. Box 909, Yonkers, New York 10703, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under Articles 12-A and 13-A of the Tax Law.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York on April 17, 2001 at 10:40 A.M., with all briefs to be submitted by August 10, 2001, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by John A. Tartaglia, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Todd M. Kerner, Esq., of counsel).

***ISSUE***

Whether petitioner has established that the Division's proposed cancellation of its registration as a Retailer of Heating Oil Only is unwarranted and should be denied.

***FINDINGS OF FACT***

1. Petitioner, Century 2000 Petroleum, Inc., filed an Application for Registration as a Distributor of Diesel Motor Fuel, Retailer of Heating Oil Only, Distributor of Kero-Jet Fuel

Only, or Retail Seller of Aviation Gasoline (“Form P-600”). This application, hand-dated as signed on November 5, 1998 and stamp-dated as received by the Division of Taxation (“Division”) on November 13, 1998, indicates that petitioner sought to be registered solely as a retailer of heating oil only. Item “12” of this application, which requires a listing of all “owners, directors, partners and responsible individuals” of the applicant, listed only Angelo LoPriore under the title “President.” The instruction sheet for Form P-600 requires, with regard to Item “12”, that the applicant must specify those individuals having the final authority for signing checks on the company’s bank account; signing the business’s tax returns; paying creditors; making the final decision on which bills are to be paid; conducting the business’s general financial affairs; filing returns or paying taxes imposed by Article 12-A of the Tax Law; and complying with any other requirement of the Tax Law. The application, which indicates petitioner to be a “new company,” is signed by Angelo LoPriore under the title “President.”

2. In response to the filing of this application, the Division’s field audit management personnel conducted an interview of Angelo LoPriore, the only person listed on the application. During the course of this interview, Angelo LoPriore’s son, Frank LoPriore, came into the interview. When asked whether Frank LoPriore would have any involvement with petitioner’s business, both Frank LoPriore and Angelo LoPriore responded that Frank LoPriore would not be involved.<sup>1</sup>

3. It is undisputed that Frank LoPriore and two companies owned by him, to wit, Dade Oil, Inc. and Rainbow Fuel Service, Inc., have unpaid fixed and final tax liabilities under Articles 12-A and 13-A of the Tax Law. Dade Oil, Inc. owes the Division in excess of

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<sup>1</sup> Petitioner did not provide testimony by any witnesses in this matter, including testimony to dispute or refute the Division’s version of events which transpired during the field visit prior to petitioner’s registration. In this regard, Angelo LoPriore and Frank LoPriore both attended the hearing, but opted not to testify.

\$65,000.00 and Frank LoPriore individually owes in excess of \$15,000.00 in associated liabilities, while Rainbow Fuel Service, Inc. owes the Division in excess of \$206,000.00 and Frank LoPriore individually owes in excess of \$73,000.00 in associated liabilities. Frank LoPriore's involvement in both of these companies is discussed in detail in *Matter of Dade Oil, Inc.* (Tax Appeals Tribunal, November 5, 1995), where the Tribunal sustained the Division's denial of his Application for Registration as a Retailer of Heating Oil Only.

4. Upon the representations that Frank LoPriore would not be involved in petitioner's business, on December 30, 1998, the Division issued to petitioner a registration to operate as a retailer of heating oil only.

5. Petitioner did not file its required tax return as a retailer of heating oil only for the first quarter of 1999. In turn, the Division issued a letter dated May 11, 1999 demanding that the delinquent return be filed within ten days. In response, the Division received a letter on petitioner's letterhead, dated July 23, 1999, together with a Form PT-200 ("Petroleum Business Tax Return"). The July 23, 1999 letter, as well as the tax return, are signed by Frank LoPriore under the title "vice-president." The letter states that Frank LoPriore "filled out the forms" and also states that "I can assure you that all returns will be filed and paid promptly." The return did not correspond to any particular reporting period and there was no payment of tax accompanying the return.

6. The Division issued a letter to petitioner dated July 28, 1999, noting that Frank LoPriore had not been listed as an officer or responsible individual on petitioner's application and inquiring about the duties Frank LoPriore would be performing on behalf of petitioner. Petitioner responded by letter dated August 16, 1999, indicating that Frank LoPriore was appointed to the position of vice-president and would be handling petitioner's day-to-day

operations, including the responsibility for signing checks and tax returns, and paying bills. In response to a follow-up letter from the Division dated August 19, 1999, petitioner admitted by letter dated September 14, 1999 that Frank LoPriore had been appointed vice-president on January 1, 1999, some two days after the Division had issued petitioner's registration and the same date that petitioner commenced its operations.

7. The Division did not receive petitioner's Retailer of Heating Oil Only tax returns for the second or third quarters of 1999. In turn, the Division issued to petitioner a ten-day letter, dated October 15, 1999, demanding the tax returns and associated payments covering the first three quarterly periods of petitioner's operations. The Division did not receive a timely response and as a result, canceled petitioner's registration to operate as a retailer of heating oil only, upon the basis that petitioner had failed to comply with the requirements of the ten-day letter.

8. Petitioner filed the delinquent returns, signed by Frank LoPriore as vice-president, and made payment of the tax due with such filing. As a result of this filing and payment, the Division agreed to rescind its cancellation of petitioner's registration, and petitioner and the Division so stipulated. The recission was accomplished by an Order of Discontinuance issued by the Division of Tax Appeals dated February 24, 2000. The Order of Discontinuance expressly allowed the Division to issue a Notice of Proposed Cancellation pursuant to Tax Law § 283(6), subject only to the limitation that the Division would not assert as a ground for cancellation the unregistered operation of petitioner's business during the pendency of petitioner's protest against the cancellation of its registration for the period from October 28, 1999 through the date of the stipulation.

9. On April 5, 2000, the Division issued to petitioner a Notice of Proposed Cancellation of Registration as a Retailer of Heating Oil Only. This Notice sets forth six grounds for the proposed cancellation, as follows:

- a) Frank LoPriore was not included on the application as a responsible person;
- b) Frank LoPriore, an employee under a duty to act for petitioner, has liabilities under Article 12-A finally determined to be due and which have not been paid;
- c) Frank LoPriore is president and 100% owner of Rainbow Fuel Service, Inc., a corporation with outstanding tax liabilities with respect to its diesel motor fuel operations;
- d) Frank LoPriore is president and 100% owner of Rainbow Fuel Service, Inc., a corporation which failed to comply with section 287 of the Tax Law relating to the filing of petroleum business tax returns and payment of tax thereon;
- e) Frank LoPriore is president and 100% owner of Dade Oil, Inc., a corporation with outstanding tax liabilities with respect to its diesel motor fuel operations; and
- f) Frank LoPriore is president and 100% owner of Dade Oil, Inc., a corporation which failed to comply with section 287 of the Tax Law relating to the filing of petroleum business tax returns and payment of tax thereon.

10. Petitioner does not deny Frank LoPriore's involvement in the business conducted by petitioner. However, petitioner justifies such involvement as necessary due to illnesses suffered by Angelo LoPriore, his wife, and his grandson, which left Angelo LoPriore unable to operate petitioner's business for a period of time. Specifically, Angelo LoPriore's wife suffered a stroke at some point in February 1999, resulting in an extended period of hospitalization. Thereafter, at some point in March 1999, Angelo LoPriore encountered medical difficulties which impacted his ability to walk and stand. In addition, Angelo LoPriore's grandson by his daughter Rose

Marinelli became seriously ill at some point in the summer of 1999, thereby curtailing Rose Marinelli's ability to assist Angelo LoPriore with bookkeeping tasks for petitioner.

### ***CONCLUSIONS OF LAW***

A. Tax Law § 282-a(1) imposes an excise tax upon sales of diesel motor fuel sold in New York State, and prohibits any person from engaging in the sale of diesel motor fuel in the state unless registered as a distributor. Tax Law § 282-a(2) allows for the registration of a distributor of diesel motor fuel as a retailer of heating oil only, if such distributor makes sales of diesel motor fuel to consumers solely for heating purposes. Notwithstanding that such distributor may be registered for retail sales of heating oil only, the full registration provisions of Tax Law § 283 are applicable to such registration of retailers.

B. Tax Law § 283(4) lists certain acts as grounds upon which the Division may cancel the registration of a diesel motor fuel distributor, including a registration as a retailer of heating oil only, as follows:

The registration of any distributor may be canceled or suspended by the commissioner where a registrant, or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the registrant . . . fails to file a bond or other security when required or when the amount thereof is increased . . . or fails to comply with any of the provisions of this article [Article 12-A, Tax on Gasoline and Similar Motor Fuel] or article twenty-eight of this chapter [Sales and Compensating Use Tax] with respect to motor fuel or any rule or regulation adopted pursuant to this article or article twenty-eight of this chapter with respect to motor fuel . . . , or knowingly aids or abets another person in violating any of the provisions of such articles or of any such rule or regulation with respect to motor fuel, or transfers its registration as a distributor without the prior written approval of the commissioner. A registration may also be canceled or suspended if the commissioner determines that a registrant or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the registrant (where such

registrant is a corporation) entitling the holder thereof to vote for the election of directors or trustees of such registrant . . . :

- (i) commits fraud or deceit in his operations as a distributor or has committed fraud or deceit in procuring his registration;
- (ii) has been convicted in a court of competent jurisdiction, either within or without the state, of a felony, within the meaning of subdivision eight of this section, bearing on such distributors's duties and obligations under this chapter;
- (iii) has knowingly aided and abetted a person who is not registered as a distributor in the importation, production, refining, manufacture or compounding of motor fuel;
- (iv) has impersonated any person represented to be a distributor under this article but not in fact registered under this section; or
- (v) has knowingly aided and abetted the distribution of motor fuel imported, caused to be imported, produced, refined, manufactured or compounded by a distributor who is not registered by the department of taxation and finance.

A registration may also be canceled or suspended if the commissioner determines that a registrant or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten per cent of the number of shares of stock of the registrant . . . , was an officer, director, shareholder, employee or partner of another person who as such officer, director, shareholder, employee or partner was under a duty to act for such other person or was a shareholder directly or indirectly owning more than ten percent of the number of shares of stock of such other person (where such other person is a corporation) entitling the holder thereof to vote for the election of directors or trustees of such other person at the time such other person committed any of the acts or omissions which are, or was convicted as, specified this subdivision within the preceding five years.

The clear aim of the registration provisions is to allow for “an examination of the character and suitability of . . . employees . . . of the applicant” with regard to collecting, holding in trust and timely paying over taxes properly due the State. (*Id.*)

C. In recent years, the Legislature has enacted an elaborate system concerning registration, licensing and record keeping with respect to persons engaged in manufacturing, importing, selling, distributing and transporting motor fuel and diesel motor fuel in New York State. The intent behind this system, specifically as it relates to registration, was discussed in *Matter of Diamond Terminal Corporation v. Dept. of Taxation & Finance*. (158 AD2d 38, 557 NYS2d 962, *lv denied* 76 NY2d 711, 563 NYS2d 767), where the Court observed with regard to Tax Law § 283-b that:

the bill would enable [the Commissioner] to examine more closely the persons involved in the importation process . . . by expanding the provisions of law regarding the registration of distributors and the cancellation and suspension of registrations. The expanded provisions would permit an examination into the character of the persons controlling the distributor and would make it more difficult to circumvent the statutory standards (Mem of Commissioner of Taxation and Finance, Governor's Bill Jacket, L1986, ch 276).

In *Matter of OK Petroleum Products Corp.* (Tax Appeals Tribunal, November 1, 1990), the Tribunal stated the following with respect to the registration provisions of Tax Law Article 12-A:

[t]he obvious intent of the change in the registration provisions was to provide the Commissioner with the opportunity to decide whether the distributors who would be receiving tax moneys and holding them in trust until paid over to the State could be relied upon to properly exercise their tax collection responsibilities (*see*, Memorandum of State Department of Taxation and Finance, 1986 McKinney's Session Laws of NY, at 2882).

D. The Division's determination to cancel petitioner's registration should be sustained. The Division's six grounds for cancellation, are premised essentially upon three facts, to wit:

1) that Frank LoPriore is, and has been directly involved in conducting petitioner's business since day one of its operations, holding the title of vice-president and being responsible for filing tax returns and remitting any tax due;

2) that Frank LoPriore's past record of failures in compliance with the timely filing of returns and remittance of tax are clearly established, as borne out by the existence of outstanding unpaid petroleum tax liabilities owed by Frank LoPriore, Dade Oil, Inc. and Rainbow Fuel Service, Inc., thus constituting not only direct grounds for refusal to register or to cancel the registration of a petroleum business in which Frank LoPriore holds a position of responsibility, but also militating against his suitability to carry out the responsibilities for assuring timely filing and remittance in the future; and

3) that Frank LoPriore's status with and involvement in petitioner's business not only was undisclosed on petitioner's application for registration in this matter, but further was specifically denied upon questioning during the course of a field visit by Division personnel prior to issuance of a registration to petitioner.

E. Petitioner's challenge to the proposed cancellation is based on the assertion that Frank LoPriore's involvement was not intended or anticipated at the time of registration, but rather was necessitated thereafter as the result of illnesses within the LoPriore family as detailed. In addition, petitioner maintains that there have been offers for compromise and settlement of the outstanding liabilities owed by Frank LoPriore and the two companies, Dade Oil, Inc. and Rainbow Fuel Service, Inc., but that the Division has rejected such offers. Finally, petitioner maintains the Division's claim that petitioner's failure to disclose Frank LoPriore's involvement at the time of application was intentional and deliberate represents an assertion of fraud, with respect to which the Division bears the burden of proof.

F. The record supports the conclusion, notwithstanding petitioner's protestations, that Frank LoPriore was always intended to be involved in petitioner's operations. The admission that he was appointed petitioner's vice-president and was involved in petitioner's day-to-day operations as of the start of business for petitioner on January 1, 1999, and that his duties included signing checks and tax returns and paying bills, stands directly in contrast to the absence of his name from the application for registration, and to the statements made by Angelo

LoPriore and Frank LoPriore to the Division's field representative that Frank LoPriore would have no involvement. The application for registration is clear in its requirement that all persons who are to be involved and hold positions of responsibility in the applicant's operations are to be disclosed on the application (*see*, Finding of Fact "1"). The clear conclusion to be drawn from the facts of this case is that the absence of Frank LoPriore's name from petitioner's application was deliberate as opposed to inadvertent. Petitioner asserts Frank LoPriore's involvement was necessitated by family illnesses as described. In this regard, petitioner made application for registration in early November 1998, a field interview was conducted shortly thereafter in which Frank LoPriore's involvement was questioned and directly denied, and on December 30, 1998 a registration was issued to petitioner. Two days later, and prior to the illnesses described, petitioner commenced operations with Frank LoPriore apparently fully involved and holding the title of vice-president. Simply put, the claim that petitioner never intended or anticipated Frank LoPriore's involvement in its business is not believable.

G. Petitioner unquestionably bears the burden of establishing that the grounds stated by the Division do not support its Notice of Proposed Cancellation (*Matter of Janus Petroleum*, Tax Appeals Tribunal, July 11, 1991, *annulled on other grounds*, *Matter of Janus Petroleum v. Tax Appeals Tribunal*, 180 AD2d 53, 583 NYS2d 983). Contrary to petitioner's claim, the Division is not asserting fraud in this matter. Rather, the grounds for proposed cancellation are based not only on the failure to disclose Frank LoPriore's involvement in petitioner's business at the time of application for registration, but ultimately on Frank LoPriore's involvement in fact in a position of responsibility in light of his prior record of compliance failures when holding the same responsibilities for other entities. Petitioner has offered nothing to refute such failures or overcome the Division's grounds for proposed cancellation. Petitioner's claim that offers to

compromise and settle the outstanding liabilities of Frank LoPriore, Dade Oil, Inc., and Rainbow Fuel Service, Inc., have been made and rejected has no bearing on this matter. The Division may, of course, accept a compromise of outstanding tax liabilities upon terms mutually acceptable to the parties to such a compromise. At the same time, however, there is no obligation on the part of the Division or a taxpayer to compromise such liabilities, and the Division's decision not to do so with respect to the noted liabilities, for whatever reasons, is of no moment here.

H. Whatever good intentions Frank LoPriore may have with respect to assuring timely filing and payment on behalf of petitioner, there remain the outstanding unpaid petroleum tax liabilities owed by Frank LoPriore and by companies he owned and operated. Such past failures and resulting liabilities alone stand as a bar to petitioner's registration (*see Matter of Shaw v. Tax Appeals Tribunal*, 203 AD2d 720, 610 NYS2d 971, *lv denied* 84 NY2d 803, 617 NYS2d 137; *Matter of Linda M. Smith*, Tax Appeals Tribunal, August 27, 1998 *citing Matter of Shore Line Oil Co.*, Tax Appeals Tribunal, February 15, 1996). Moreover, such failures call in to question the likelihood of timely filing and payment in the future. Coupling the same with the failure to disclose and identify Frank LoPriore as directly involved with petitioner's operations, notwithstanding his direct involvement in fact, provides ample support for the Division's proposal to cancel petitioner's registration. Accordingly, the Division's proposal to cancel petitioner's registration is sustained.

I. The petition of Century 2000 Petroleum, Inc. is hereby denied and the Division's Notice of Proposed Cancellation, dated April 5, 2000, is sustained.

DATED: Troy, New York  
January 24, 2002

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE